

HILDENE CAPITAL MANAGEMENT, LLC

HILDENE CAPITAL MANAGEMENT, LLC
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January 5, 2019

VIA EMAIL

rule-comments@sec.gov

Office of the Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Administrative Proceeding File Number 3-16776

Dear Mr. Fields:

Hildene Capital Management, LLC (“Hildene” or “we”) is a registered investment adviser that provides discretionary investment management services to a diverse array of clients. We have made numerous investments on behalf of our clients in TruPS CDOs, including the Taberna CDOs. We appreciate the opportunity to comment on the Proposed Plan of Distribution with respect to the above-referenced proceeding (the “Proposed Plan”) and respectfully submit the comments set forth below.¹

We believe the Proposed Plan provides for an unfair and unreasonable distribution of the funds collected in the Fair Fund, and does not reflect the spirit of the Commission’s findings in the Order that Taberna’s actions had caused harm to its clients, the Taberna CDOs. By providing for distributions directly to individual investors rather than to the Taberna CDOs for application through the payment waterfalls set forth in the respective indentures, the Proposed Plan will unjustly enrich certain individual senior classes of investors to the detriment of the Taberna CDOs and other classes of junior investors. Fair Fund proceeds, instead, should be allocated to the Taberna CDOs in *pro rata* proportion to the Exchange Fees that were withheld from them (as set forth in paragraph 35 of the Proposed Plan) and distributed to the Taberna CDO trustees for application through the established payment waterfalls set forth in each Taberna CDO indenture.

The Respondents’ conduct of withholding Exchange Fees resulted in harm to the Taberna CDOs that permanently altered their payment waterfalls. Had the Exchange Fees been paid to the Taberna CDOs, the funds would have been applied to the respective waterfalls by the

¹ Capitalized terms used but not otherwise defined herein have the meanings given thereto in the Proposed Plan.

Taberna CDO trustees and paid to investors in the order of priority that was established in each of the respective indentures. In most cases, the Exchange Fees would have been applied to reduce the outstanding principal balance of the most senior class of notes outstanding at the time but because the Exchange Fees were not received, other mechanisms designed to protect the senior class of notes caused that debt to be repaid on an accelerated basis. As discussed below, after an extended period of time, these additional protections redirected payments from junior classes to reduce the outstanding amount of the senior notes down approximately to the amount that they would have been had the Exchange Fees been paid to the Taberna CDOs. If the Fair Fund is distributed to these holders of the senior classes now, those senior classes of notes will effectively “double dip” in receiving principal through the waterfall *and* distributions from the Fair Fund. The damage can best be rectified in substantial part by now distributing funds through the respective waterfalls to “right-size” the outstanding principal amounts of classes that should have been paid down had the Exchange Fees been properly paid to the Taberna CDOs.

Each Taberna CDO during the relevant time period was diverting interest proceeds to pay down senior class principal due to failed coverage tests. Had the Exchange Fees been properly paid to the Taberna CDOs, the Exchange Fees, whether applied as interest proceeds or as principal proceeds, would have paid down senior class principal to the benefit of the Taberna CDOs and all investors. Senior class investors would have received distributions in reduction of their principal, and junior class investors would have experienced a reduction in payment subordination (i.e., a reduction of senior debt that needed to be repaid first), moving closer in line to receiving waterfall proceeds. The Taberna CDOs, likewise, would have reduced their outstanding liabilities and consequently their interest expense, which in turn would have benefited junior class investors by permitting more proceeds to be applied to reduce senior class principal. The Proposed Plan, by diverting funds outside of the payment waterfalls, does not achieve the stated benefit of putting investors in the same position as if the Exchange Fees had been paid to the Taberna CDOs. Instead, distributions under the Proposed Plan do not cause any adjustments to be applied to the outstanding amount of senior class principal and fail to provide benefits otherwise expected by, and bargained for in the indenture by, the Taberna CDOs and junior class investors.

Moreover, senior class investors who failed to receive principal payments due to the Respondents’ conduct have already been or will soon be justly compensated. To the extent they have since sold out of their positions, any trades were negotiated based on then outstanding principal balances and therefore trade proceeds already compensated them for the transfer of their full outstanding principal balances. Likewise, for senior class investors who have continued to hold their positions, if Fair Fund proceeds were distributed through the waterfalls as we propose, these investors would receive those proceeds through the waterfalls as expected originally. Regardless whether Fair Fund distributions are considered interest proceeds or principal proceeds would not change this fact as (i) each of the Taberna CDOs continues to currently, and will for the foreseeable future, divert interest proceeds to senior classes due to failed coverage tests and (ii) almost all of the Taberna CDOs have been accelerated and are thus directing payments to the most senior class in any event. Indeed, even absent Fair Fund distributions, current market expectation is that these senior classes will all be repaid in full. To provide these senior class investors with additional compensation from the Fair Fund without

appropriately reducing their outstanding principal balances unjustly enriches them to the detriment of the Taberna CDOs and junior class investors.²

The proper parties to receive distributions out of the Fair Fund are the Taberna CDOs, not the individual investors. As the Commission states in the Order and the Proposed Plan respectively, the Exchange Fees “should have gone to the CDOs” and “should have been paid to the CDOs”. That same principle applies with respect to the funds at issue here. Indeed, the Order made findings of Advisers Act violations, including Taberna’s fraudulent practices against its clients and misrepresentations in its Form ADV disclosure to its clients. The Order also found that Taberna had violated the Exchange Act by failing to register as a broker-dealer, which registration is intended to protect the interests of customers for or with whom broker-dealers transact. Taberna’s clients and customers – i.e., the Taberna CDOs – are the appropriate harmed parties here, and therefore it is the Taberna CDOs that should rightfully receive distributions under the Fair Fund.

We urge the Commission to reconsider the Proposed Plan. Our proposed approach would not create undue ambiguity or complexity in applying Fair Fund distributions through the waterfall and would be significantly easier and more equitable to apply than the Proposed Plan. The Order indeed refers to several similar fees which were received into the Taberna CDOs in 2008 and applied through the waterfalls “pursuant to the provisions of the Indenture defining Interest Proceeds as including ‘. . . all amendments and waiver fees, all late payment fees and all other fees and commissions received during the related Due Period,’ and defining Principal Proceeds as including ‘. . . any other payments received with respect to the Collateral and not included in Interest Proceeds.’” Any distributions representing disgorged Exchange Fees would be treated in a similar fashion by the respective indenture, and any distributions representing prejudgment interest and civil penalties would be treated as principal proceeds under the catchall provision capturing any payments other than interest proceeds. In any event, whether the proceeds are allocated as interest proceeds or principal proceeds makes no practical difference as all the Taberna CDOs, as mentioned above, are diverting interest proceeds from junior class holders to senior class holders due to failed coverage tests and/or acceleration.

² We recognize that a handful of junior classes, which we refer to in this footnote as “mezzanine classes”, appear on the schedule of Harmed Securities set forth in the Proposed Plan. Although difficult to discern from the text of the Proposed Plan, we believe any entitled distributions to these mezzanine class investors under the Proposed Plan would be compensation for small interest shortfalls that appeared in those classes in a handful (or fewer) payment periods and would likely be *de minimus*. Moreover, the same principles discussed in this letter with respect to senior class investors vis-à-vis the Taberna CDOs and junior class investors apply with respect to these mezzanine classes and any other classes junior thereto. Each of the mezzanine classes trades with a deferred or defaulted interest balance, meaning any unpaid interest due to the aforementioned shortfalls was added to the aggregate outstanding balance of these mezzanine classes as a deferred or defaulted interest component and continued to compound. Fair Fund distributions to mezzanine classes outside of the payment waterfalls would, as explained in the body of our letter above, permit those classes to “double dip” in proceeds by receiving Fair Fund distributions *and* waterfall distributions on account of their deferred or defaulted interest without reducing their outstanding balances, again to the detriment of classes junior thereto and the Taberna CDOs.

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Given the above, as stated, we believe the fairest and most appropriate method for distributing Fair Fund proceeds is to distribute to each Taberna CDO its *pro rata* allocation for further application through the payment waterfalls set forth in the Taberna CDO indentures.

Thank you for your consideration.

Respectfully yours,

A handwritten signature in black ink, appearing to read "John W. Scannell". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke extending to the right.

John W. Scannell
Chief Operating Officer